United States Court of Appeals

for the Second Circuit

APPENDIX

74-1183

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JAMES HORELICK,

Petitioner-Appellee,

against

THE CRIMINAL COURT OF THE CITY OF NEW YORK; DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; FRANK S. HOGAN, District Attorney, New York County; and BENJAMIN MALCOLM, New York City Commissioner of Correction,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX

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Docket Entries.

U.S.A. ex rel. JAMES HORELICK

v.

THE CRIMINAL COURT, et al.,

DATE	PROCEEDINGS
Feb. 27-73	Filed Petition for Writ of Habeas Corpus.
Feb. 28-73	Filed Order to Show Cause Ret. 3-13-73 at 10 AM re: grant writ. Ordered that pending determination of the application, respondents are enjoined as indicated. Lasker, J.
Mar. 20-73	Filed Affidavit in opposition. to petr's. application for habeas corpus relief.
Nov. 27-73	Filed petitioner's brief in support of petition.
Nov. 27-73	Filed OPINION #40,048 The convictions for trespass are set aside and the writ is granted in full unless the State resentences Horelick for resisting arrest within 30 days. It is so ordered—Lasker, J.—mailed notice
Dec. 4-73	Filed order that order of the Court of 11-30-73 is stayed, pending disposition of the appeal. . . . Lasker, J.
Jan. 2-74	Filed Respondent's Notice of Appeal from order entered on December 4.
Feb. 8-74	Filed stip. between parties that the two volume transcript of petitioner's trial in the Criminal Court of the City of NY be designated as an exhibit for the record on appeal.

Petition for Writ of Habeas Corpus.

To the Honorable United States District Court
for the Southern District of New York

The petition of James Horelick respectfully shows:

1. I am at present unconstitutionally in custody, in that I have been ordered to surrender to the Criminal Court of the City of New York on February 28, 1973, for the execution of a sentence of $500.00 or, in lieu thereof, to serve sixty days in prison, pursuant to the terms of my release on bail under a certificate of reasonable doubt and a stay of execution of my sentence, upon a charge of trespassing on two occasions during the New York City teachers strike in a school where I was authorized as a teacher to be present, and upon a charge of resisting arrest.

Exhaustion of Remedies

2. Your petitioner was convicted in the New York City Criminal Court, New York County, before the Hon. William F. Suglia, of the crimes of trespass in the second degree, a class B misdemeanor (New York Penal Law § 140.10) on two occasions, and of resisting arrest, a class A misdemeanor (*id.* § 205.30). During the year 1968, I was a teacher duly licensed by the New York City Board of Education and I taught at Washington Irving High School. During the teachers' strike of 1968, I was charged with trespass by entering Washington Irving High School on two occasions, and resisting arrest on one occasion. The sentence noted above in paragrph 1 of this petition was imposed in Judge Suglia's judgment of conviction on June 19, 1970. Prior to that judgment there were presented to Judge Suglia the following points of law, among others:

(a) the trespass statute was not applicable to my conduct because of an authorization to be in the school;

(b) as applied to my conduct, the trespass statute denied me due process of law and infringed my First Amendment rights to academic freedom;

(c) the application of the resisting arrest statute to my conduct denied me due process of law.

3. The Appellate Term, First Department, of the Supreme Court of the State of New York affirmed my conviction without opinion on November 5, 1971. The issues noted in paragraph 2, *supra*, among others, were preserved on appeal. In addition, my counsel argued that application of the trespass statutes to my conduct would require an *ex post facto* change in the law.

4. The New York Court of Appeals affirmed my conviction on June 7, 1972, by a divided vote of four to three. The official report of the opinion appears at 30 N.Y.2d 453, and is set forth in the petition for a writ of certiorari to the United States Supreme Court, which is attached hereto as Appendix I.

5. The issues noted in paragraph 2 and 3, *supra* were presented to the New York Court of Appeals, including the argument that my conviction could not be affirmed without an *ex post facto* law. The decision of that Court was nevertheless bottomed on the novel theory that my entry into the school constituted a "forcible entry and detainer" or "breaking and entering." This determination was, on information and belief, not in accord with existing New York law. Accordingly, by a motion to reargue, a copy of which is attached hereto as Appendix II, my counsel sought to show, in addition to the points originally raised, that the decision of the majority of the New York Court

of Appeals constituted a determination of guilt under an *ex post facto* law and that conviction both of trespass and of resisting arrest constituted an unconstitutional form of entrapment, since I had an express authorization to be in the school. That motion to reargue was denied without opinion by the New York Court of Appeals on September 28, 1972.

6. A petition for a writ of certiorari to the United States Supreme Court was timely filed (Appendix I) and certiorari was denied on February 20, 1973, Douglas, J. dissenting.

7. After the judgment of conviction and sentence of June 19, 1970 in the New York City Criminal Court, I was committed to New York City prison, but I was released pursuant to a Certificate of Reasonable Doubt issued by a Justice of the New York State Supreme Court on June 24, 1970, upon bail of one dollar ($1.00). That bail was continued in a stay issued by the Hon. Stanley Fuld of the New York Court of Appeals on November 7, 1972, pending my application for a writ of certiorari to the United States Supreme Court. I have now been directed to surrender in the Criminal Court on February 28, 1973.

UNCONSTITUTIONALITY OF RESTRAINT

8. The following paragraphs 9 through 15 set forth the substantive facts of this case, as developed at my trial, which will, it is submitted, make clear the unconstitutional nature of your petitioner's conviction and restraint.

9. As noted in paragraph 2, *supra*, I was, during the year 1968, a duly licensed teacher for the New York City Board of Education, assigned to teach at Washington

Irving High School. During the fall of 1968, there was a series of bitter strikes by many of the teachers, on information and belief, precipitated by disagreements with the Board of Education, relating to the transfer of some governing functions in the New York City school system to so-called "community boards." The strike was conceded by all parites to be illegal. I was one of a large group of teachers who were not in sympathy with the aims of the strike, and as such I went to my school on a number of occasions hoping to find it physically open, but it was locked by the custodian in sympathy with the strike.

10. On October 16, 1968, a strong announcement was made by the Board of Education, that the schools were to be open if even one teacher wanted to go and teach (See statement of Board, Def's. Ex. C at trial, p. 17a of Exhibit I hereto).

11. The very next morning, I was present with a group of teachers who wanted to teach, pursuant to this directive. A senior faculty member, Edward Williams, obtained a letter from the Acting Superintendent, making him a teacher-in-charge, since the principal would not or did not open the school (See Def's. Ex. A, *id.* p. 16a). After the principal and the custodian, who were participating in the strike, declined to honor this letter, the teacher-in-charge, Mr. Williams, said words to the effect that "it was our building" if we could get in, because we had the letter. I then entered the building by a window previously left open. Shortly afterward, I was arrested on the complaint of the custodian and charged with trespass, roughed up by the police, and charged with resisting arrest. A co-defendant, Sandra Adickes, was arrested outside the building and charged with resisting my arrest.*

* Her conviction was reversed for lack of proof of intent, also on a 4-3 vote, 30 N.Y.2d 461 (1972).

12. October 19, 1968 was a Saturday. On that occasion Washington Irving High School was opened by the custodian for a regularly scheduled concert of chamber music. I was present with other teachers; we were ordered to leave and we did leave. On advice of counsel, I reentered to speak to the police who were present, in an effort to make a complaint against the custodian for obstructing governmental administration. The police ordered me to leave, and I was again arrested for trespass when I asked the same or a similar question again.

13. At my joint trial with Ms. Sandra Adickes in Criminal Court, Mr. Edward Williams, the teacher-in-charge, and Mr. Jack Landman, the Acting District Superintendent, testified to the authority to open the school. John Doar, President of the Board of Education at that time, testified unequivocally. The dissent in the New York Court of Appeals accurately summarized his testimony (30 N.Y. 2d at 458):

> "John Doar, who on October 16, 1968 and immediately thereafter was the president of the board of education, testified that the board had voted to keep the schools open during the then current teachers' strike and the board also had agreed on the text of a 'directive' which he was authorized by the board to publish.
>
> "This directive, he testified, was addressed to the superintendent of schools, 'to the employees of the school,' to the students, to their parents and to the citizens of the city. The Assistant District Attorney on the trial expressly conceded, in answer to the court's question, that the directive 'was formulated by a majority of the Board at a duly constituted meeting.'
>
> "Mr. Doar also testified unequivocally that the schools were never closed by the board during the strike, either

informally or formally, and that 'some of the employees of the Board were illegally, without authority closing the schools and locking them.'

"The directive as published was 'to tell publicly employees of the Board and custodians and [that] we want to make it clear even if one teacher would want to go to school to teach that the school would be open.' "

14. I am informed by my counsel that there was no authority for my conviction under the New York State law of trespass as it then was, and as the dissent in the New York Court of Appeals pointed out. The majority of that Court affirmed my conviction upon the theory that my entering the window was made criminal under other theories of law, such as "forcible entry and detainer," assimilated by them to the law of trespass. I am informed by my counsel that there was also no previous authority under the law of forcible entry and detainer for my conviction.

15. The imposition of criminal penalties upon me as a consequence of my entering the school pursuant to the strong directive of the Board of Education is in violation of the First and Fourteenth Amendments to the United States Constitution, in that:

(a) By a radical change in the law of trespass after arrest and trial, your petitioner was denied due process of law through the use of an *ex post facto* law.

(b) By permitting the conviction of a teacher for trespassing in his own school, when your petitioner had an express privilege to be there, the state courts made the law of trespass so vague and overbroad as to deny your petitioner due process of law.

(c) By changing the law of trespass so as to permit members of one academic faction to punish a member of another, in a manner which could not be foreseen, the state courts denied your petitioner academic freedom and due process of law.

(d) The arrest and conviction by the state for trespass and resisting arrest, after an agency of the state had given your petitioner an express privilege to be in his school, constituted a denial of due process of law.

16. No previous application has been made for the writ of habeas corpus sought herein.

17. Your petitioner seeks a stay of sentence, pending the hearing of this petition, because execution thereof would subject him to unconstitutional punishment and would tend to moot the issues. The interim stay is needed because petitioner must surrender on February 28, 1973.

WHEREFORE, petitioner prays, that a writ of habeas corpus issue, and that petitioner be relieved of his unconstitutional conviction and sentence, and that this court grant such other and further relief as to it seems just and proper.

(Verified by James Horelick, February 27, 1973.)

Opinion and Order, November 26, 1973.

APPEARANCES

Paul G. Chevigny, Esq., New York Civil Liberties Union, for petitioner.

Louis J. Lefkowitz, Attorney General, State of New York (Stanley L. Kantor, Deputy Assistant Attorney General), for respondents.

LASKER, D.J.

James Horelick petitions for habeas corpus relief from a conviction for two counts of criminal trespass and one count of resisting arrest. He was sentenced on June 18, 1970, to pay a fine of $250 or serve thirty days in jail on the first criminal trespass count and the resisting arrest count and to an additional $250 or thirty days for the second criminal trespass count. Horelick was ordered to surrender on February 28, 1973, but surrender was stayed by this court on February 27th.

Horelick's conviction results from incidents which occurred during the controversial strike of public school teachers in 1968. The strike, opposed by some teachers and favored by others, was subsequently held to be illegal. On October 16, 1968, the Board of Education voted that the schools were to remain open if even one teacher reported to work, and John Doar, then President of the Board, made a statement to that effect. District superintendents were authorized to designate teachers in charge empowered to open closed schools.

The following day a group of teachers, including the designated teacher in charge and Horelick, went to Washington Irving High School, where they were assigned to teach, and presented the teacher in charge's letter of authorization from the district superintendent to the school custodian.[1] When the latter refused to open the school,[2]

Horelick nevertheless entered the building through a window with the intention of opening the doors himself. Inside the building, Horelick was stopped by the custodian, who called for the police who placed Horelick under arrest. After an altercation between Horelick and the officers, he was charged with criminal trespass and resisting arrest. Two days later, on October 19th, Horelick returned to the school. He was again asked to leave by the custodian, and, after refusing, was placed under arrest.

On October 20th, the Board of Education issued directives clarifying the procedures to be used by teachers in charge in opening schools kept closed by their custodians, which indicated that it did not authorize a teacher to open a school in the absence of the school custodian.[3] People's Exhibit 1 at trial, Petition for Writ of Certiorari, p. 18a.

Subsequent to his arrest, Horelick brought a civil rights action in this court for an injunction against his prosecution and for damages. The complaint was dismissed and dismissal was affirmed by the Court of Appeals. *Adickes* v. *Leary,* 436 F.2d 540 (2d Cir.), *cert. denied, sub nom. Adickes* v. *Murphy,* 404 U.S. 862 (1971). Simultaneously, Horelick sought to remove the prosecution to this court. However, the case was remanded to the state court and remand was affirmed by the Court of Appeals. *People* v. *Horelick,* 424 F.2d 697 (2d Cir.), *cert. denied sub nom. Horelick* v. *New York,* 398 U.S. 939 (1970). As discussed above, after trial in the state court, Horelick was convicted of criminal trespass and resisting arrest in June, 1970. The conviction was affirmed by the Appellate Division in November, 1971. In June, 1972, by a four to three vote, the New York Court of Appeals affirmed the lower court rulings. *People* v. *Horelick,* 30 N.Y. 2d 453. Chief Judge Fuld and Judges Bergan and Gibson dissented in an opinion written by Judge Bergan. *Id.* at 458. Horelick sought reargument, but his motion was denied. 31 N.Y. 2d 709.

The United States Supreme Court denied certiorari in February, 1973 (410 U.S. 943), and, as noted above, Horelick was then ordered to surrender.

Horelick seeks habeas corpus relief on several grounds. First, he claims that the New York Court of Appeals in affirming his conviction so changed the nature of the crime with which he was charged as to deprive him of notice of the charges against him and an opportunity to defend against them in violation of the due process clause of the Fourteenth Amendment. Corollaries to this argument are Horelick's contentions that the change in the law of criminal trespass effectuated by the Court of Appeals' decision constituted *ex post facto* law-making and that, as interpreted, the criminal trespass provision is unconstitutionally vague and overbroad. Horelick further contends that to convict him for activities which he reasonably believed were authorized by the Board of Education is a form of governmental entrapment forbidden by the due process clause.

Respondents oppose Horelick's petition on the merits, but they also argue that habeas relief is precluded by the following procedural defects in the petition: 1) Horelick is not in custody as required by 28 U.S. §§ 2241(c) and 2254(a); 2) he has not exhausted his state remedies or has by-passed an available appellate procedure in violation of 28 U.S.C. § 2254(b); and 3) the issues presented here have already been decided adversely to Horelick in the prior federal litigation, so that he is barred by 28 U.S.C. § 2244 (b) from raising them again.

The first question presented by respondents, whether Horelick is "in custody" although he has not yet surrendered to serve his jail term, has been answered adversely to their position by a decision of the Supreme Court handed down since the papers on this motion were submitted. In *Hensley* v. *Municipal Court*, 411 U.S. 345

(1973), the court held that a petitioner who was released on his own recognizance pending appeal from his conviction and pending adjudication of his habeas corpus petition was in custody within the meaning of the federal habeas corpus statute. The situation there is indistinguishable from the one before us.[4]

Respondents' argument that Horelick failed to exhaust his remedies is equally without merit. Respondents claim that because the Court of Appeals of New York did not decide on direct appeal the issues presented here, although those issues were squarely raised on the motion to reargue, Horelick is obliged to seek collateral relief from the state courts before federal jurisdiction will lie. This is not the law. The fact that the state courts had the opportunity to deal with a petitioner's constitutional claims eliminates the requirement of further exhaustion. *United States ex rel. Williams* v. *Zelker,* 445 F.2d 451 (2d Cir. 1971) appears to us to be directly on point. *See also Roberts* v. *LaVallee,* 389 U.S. 40 (1967); *Brown* v. *Allen,* 344 U.S. 443 (1953).

Furthermore, it is well established that exhaustion is not required where it "will almost certainly be futile." *United States ex rel. Hughes* v. *McMann,* 405 F.2d 773, 775-76 (2d Cir. 1968). A collateral attack here would entail requesting the lower courts of the state to find the conduct of its highest court constitutionally defective, an endeavor that would surely be as unrewarding as time-consuming.

Respondents argue further that Horelick by-passed an available appellate route by failing to *appeal* to the Supreme Court, petitioning instead for a writ of certiorari. They contend that if in fact Horelick exhausted his state remedies by presenting the Court of Appeals on reargument with the issue whether its construction of the statute rendered it unconstitutionally vague and overbroad, then

the Court of Appeals' denial of the motion to reargue in effect upheld a state statute against federal constitutional attack giving Horelick a ground to appeal as of right to the Supreme Court. If so, the argument runs, by opting for the discretionary certiorari route, Horelick has deliberately by-passed an available appellate procedure barring his present habeas petition.

This approach is seriously flawed. It is unlikely that the correct route to the Supreme Court in Horelick's case was by appeal. The argument that the statute as interpreted is unconstitutional for vagueness and overbreadth, on which the right of appeal is predicated, is really secondary to the questions which predominated in the petition for a writ of certiorari and which are at the heart of the petition for habeas corpus relief. The crux of petitioner's argument is and has always been that the state proceedings deprived him of due process because the state denied him fair notice of the charges against him, subjected him to an *ex post facto* law and entrapped him. These issues are a proper subject for certiorari, but are not a ground for appeal. 28 U.S.C. § 1257. At the very least, it is safe to conclude that Horelick's failure to take an appeal under the circumstances did not constitute a deliberate by-pass barring relief in this court, especially since there was nothing for Horelick to gain by yielding an appeal of right.

Finally, respondents' claim that habeas corpus relief in this court is barred by 28 U.S.C. § 2244(b), because of the federal litigation which preceded Horelick's trial in state court, is patently frivolous. Respondents concede, as they must, that the principles of *res judicata* and collateral estoppel do not apply to habeas corpus petitions. *Sanders* v. *United States*, 373 U.S. 1 (1963). Accordingly, respondents rely on § 2244.

Both the letter and the spirit of that section render it inapplicable. Section 2244(b) on its face only covers suc-

cessive applications for the *same* relief, habeas corpus.[5] Therefore, by its own terms, it cannot preclude the petition before us, which is Horelick's first request for habeas corpus relief. As discussed above, the earlier federal litigation was brought by Horelick under the Civil Rights Act prior to his trial and therefore obviously before he was "in custody pursuant to the judgment of a State court."

Furthermore, as the *Sanders* Court stated, "§ 2244 is addressed only to the problem of successive applications based on grounds previously heard and decided."[6] 373 U.S. at 12. We cannot conceive how issues which arise from a decision by the state's highest appellate court could have been "heard and decided" before *any* state court, much less the highest court, had rendered a decision.[7]

We turn finally to the merits. Horelick's contention is that the New York Court of Appeals could not affirm his conviction for criminal trespass because the conduct proven at trial did not constitute trespass. Accordingly, in order to sustain his conviction, Horelick argues, the Court of Appeals was obliged to transform the law of trespass by importing into it a foreign element borrowed from the offense of forcible entry and detainer. Horelick's argument is two-fold: 1) The proof adduced supported neither the charge of trespass nor the uncharged crime of forcible entry and detainer; 2) the New York Court of Appeals' affirmance of his conviction on a combination of the two, even assuming that the latter had been proven, deprived him of due process of law by denying him fair notice of the charge against him and by subjecting him to *ex post facto* judicial legislation.

Since Horelick's position relies entirely on his interpretation of the New York state law of trespass and forcible entry and detainer, analysis of applicable state law is indispensable to a determination of the merits of his constitutional claims. Horelick was charged with two

counts of criminal trespass in the second degree. The applicable provision, Penal Law § 140.10, provides:

> "A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders."

The law is established that criminal trespass is not proven absent evidence of cirminal intent, which entails knowledge possessed by the person charged that his presence is unauthorized. *People* v. *Lawson,* 44 Misc. 2d 578 (App. Term 1964), *aff'd,* 16 N.Y. 2d 552 (1965) (prosecution under § 140.10's predecessor, Penal Law § 2036). The Appellate Division cogently summarized the laws of trespass under § 140.10's predecessor statute in *People* v. *Barton,* 18 App. Div. 2d 612 (1962):

> "The record is insufficient to support a conviction for the crime charged because there was no proof that defendant's intrusion was not authorized by the owner of the land nor was the evidence sufficient to establish any criminal intent.
>
> * * *
>
> [A] colourable claim of right—even if it were mistaken —negatives the criminal intent necessary for a conviction under Section 2036 of the Penal Law." *Id.* at 612-13.

See also People v. *Stevens,* 109 N.Y. 159 (1888). Accordingly, if Horelick's presence in the school was authorized or if he had reason to believe that it was authorized, his conviction could not be sustained under the law as it existed when the charges against him were brought.

Horelick argues that the statement of the President of the Board of Education that the schools were to remain

open and that closed schools could be opened by the teacher in charge constituted actual authorization to enter the school. The argument is persuasive and were we sitting as a court of first impression we might well accept it.

The effect of the statement is a subject which throughout the proceedings involving Horelick has created extensive difference of opinion. The trial judge found that Horelick's conduct was not authorized and we do not take issue with this finding inasmuch as nothing of substance turns on it. Even if Horelick's entry was in fact unauthorized, his conviction for trespass is vulnerable if he reasonably believed it to be authorized. To reiterate the holding of *People* v. *Barton,* a "colourable claim of right—*even if it were mistaken*—negatives the criminal intent necessary for a conviction." 18 App. Div. 2d at 612-3 (emphasis added).

As the three dissenting judges of the New York Court of Appeals found, the record, far from proving absence of authorization beyond a reasonable doubt, establishes a strong claim of right negating the intent necessary to prove trespass. John Doar, the Board of Education's President at the time of the strike, testified at Horelick's trial that the Board had voted to keep the schools open during the strike and that, with the Board's authorization, he had issued a directive to that effect to, among others, "the employees of the school board" (Transcript at 159 A), "to tell publicly employees of the Board and custodians and we want to make it clear even if one teacher would want to go to school to teach that the school would be open" (Transcript at 164). This was an accurate paraphrase by Doar of his televised statement of October 16, 1968, which said:

> "To assure that our system, partially crippled by this illegal strike, remains open and available to those administrators, teachers and students who choose to work, the Superintendent has directed all District Superintendents to open—and keep open—every school

> where any teachers, in fact where only one teacher, reports to work. He has directed that if only one teacher reports—in the absence of other administrators —that teacher is to be in charge of the school." Defendant's Exhibit C.

As Judge Bergan's opinion sums it up, "Mr. Horelick was assigned to this school and his right—indeed his duty under the board's directive—was to be there in spite of an illegal strike." 30 N.Y. 2d at 459. When "the highest authority in the school system had published a directive advising that the schools would remain open and inviting teachers to come to work" (*id.* at 459-60), we conclude, as did the dissenting judges, that the argument that Horelick did not have a colorable claim of right simply lacks basis in fact.

In short, however much the question of actual authorization can be debated,[8] the evidence overwhelmingly established that Horelick could and did reasonably believe that he was authorized to enter the school. Accordingly, as the law of trespass stood at the time he was charged with it, he could not have been found guilty.

This was the conclusion of the three dissenting judges of New York's Court of Appeals and as far as they were concerned the inquiry stopped there. The majority opinion of the New York Court of Appeals affirming the conviction also implicitly recognizes that the law of trespass alone could not sustain it. As that opinion posits it:

> "The issue is not the lawfulness of the closing of the school, on which there may be divergent views, but the use of self-help to enter the school and then additional force to prevent arrest. Put another way, the issue is whether the resort to self-help by 'breaking and entering' in the classic sense, is permitted, an issue laid to rest long ago by successive and ancient

statutes relating to forcible entry and detainer." 30 N.Y. 2d at 456.

The majority is clearly correct that the law of forcible entry and detainer holds that even authorized entry upon land owned or occupied by another can be criminal if accompanied by an excessive use of violence. This, however, is the beginning and not the end of the inquiry, since the questions remain whether the record establishes the requisite force and whether, if it does, this fact can be utilized as the predicate of a trespass conviction.

The leading New York case delineating the kind of force which is punishable as forcible entry and detainer is *Fults* v. *Munro,* 202 N.Y. 34 (1911). We quote the opinion extensively in order to clarify the relationship between trespass and forcible entry and the type of force which constitutes the latter:

> "The expression 'in a forcible manner,' as used in the statute, does not mean any kind of force, such as is involved in a mere trespass. Thus, as was held in a leading case after a careful review of the authorities: 'The entry or detainer must be riotous; or personal violence must be used; or there must be threats or menaces of violence; or other circumstances must exist inducing alarm or terror in the occupant of the premises.' (*Willard* v. *Warren,* 17 Wend. 257.) As was said in another case which has frequently been cited: 'It has always been held that to make an entry forcible, it ought to be accompanied with some circumstances of actual violence or terror; and, therefore, an entry which hath no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes.' (*People ex rel. Niles* v. *Smith,* 24 Barb. 16, 18.)

> "The force used must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession." *Id.* at 41-42.

The principles laid down in *Fults* have been reaffirmed time and again by the New York courts. Thus, in *Drinkhouse* v. *Parka Corp.*, 3 N.Y.2d 82 (1957), the Court of Appeals said:

> "[F]orcible entry or detainer . . . applies only where the force employed . . . is unusual, tends to bring about a breach of the peace, and the entry is with a strong hand, or by a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life and limb under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession (*Fults* v. *Munro*, 202 N.Y. 34; *Arout* v. *Azar*, 219 App. Div. 260). Mere trespass does not give rise to such an action, even when it is accompanied by 'wrenching off the lock' (*Bach* v. *New*, 23 App. Div. 548; *Schrier* v. *Shaffer*, 123 App. Div. 543)." *Id.* at 91.

See also *Brandt* v. *De Kosenko*, 57 Misc. 2d 574 (Appt. Term 1968). Thus, only force of an extraordinary nature will constitute forcible entry and detainer under New York law.

The majority opinion of the Court of Appeals concludes that the situation at the school on October 17th contained an incipient danger of riot.[9] 30 N.Y. 2d at 458. We have reviewed the relevant portions of the record with care and

find that neither riot nor threat to life or limb, as required by *Fults,* is established. At most the record reveals the presence of a crowd of teachers and students near the school on October 17th. Transcript at 57, 101-103, 121. The only proof in the record of crowd activity or of Horelick inciting the crowd to act concerned the brief scuffle which occurred while Horelick was being placed in the patrol car outside the school building. Transcript at 101-103. This incident is a far cry from a riot and in any event is not relevant to the issue of trespass or forcible entry since it took place after Horelick was arrested and outside of the building. In short, no evidence of riot was adduced.

In any event, even if the record had conclusively established the facts necessary to support a conviction for forcible entry and detainer, the question would still remain whether the test for such a conviction can properly be assimilated into the law of trespass to support a conviction for the latter. Horelick relies on three decisions of the Supreme Court, *Cole* v. *Arkansas,* 333 U.S. 196 (1948); *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964) and *Rabe* v. *Washington,* 405 U.S. 313 (1972), to argue that it cannot.

In *Cole* v. *Arkansas,* the Court vacated a conviction which had been obtained under one provision of state law, but on appeal upheld under another. In so doing, the Court reiterated an already well settled rule:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." 333 U.S. at 201.

In applying this principle to the facts before it, the Court concluded:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.*

In *Bouie* v. *City of Columbia,* the Court was confronted with a factual situation not dissimilar to the one before us. The state appellate court had affirmed convictions for trespass even though the statute on its face required proof that notice prohibiting entry had been given and such proof had not been adduced. The petitioners argued that by altering the statute to fit the facts, "the State [had] punished them for conduct that was not criminal at the time they commited it, and hence [had] violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." 378 U.S. at 350. Reversing the state court decision, the Court stated that "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language"[10] (*id.* at 352) and concluded that "[i]ndeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids" (*id.* at 353).

Unlike *Bouie,* which involved state court affirmance of a conviction despite the absence of proof of what had theretofore been considered an essential element of the crime, *Rabe* v. *Washington* saw a conviction sustained by the Washington Supreme Court because of the presence of an element which had not before been found sufficient to render otherwise legal conduct criminal. Rabe was a

motion picture operator who was convicted for showing an obscene movie in a drive-in theater. The state appellate court found that the picture would not have been obscene if shown only to consenting adults. It affirmed, however, because in its opinion the context of the showing made it susceptible to proscription. The Supreme Court reversed:

> "To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. The statute under which petitioner was prosecuted, however, made no mention that the 'context' or location of the exhibition was an element of the offense somehow modifying the word 'obscene'. Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating." 405 U.S. at 315.

Applying the principles enunciated in *Cole, Bouie* and *Rabe,* Horelick's trespass convictions cannot stand. Like the petitioners in *Cole,* Horelick's conviction for trespass was sustained essentially because the majority of the Court of Appeals found that his conduct constituted forcible entry and detainer. Of course, the state court in *Cole* specifically affirmed on the basis of a separate and distinct criminal offense, whereas the New York Court of Appeals here has achieved the same end merely by importing the elements of the second offense into the first. In this respect, Horelick's case more closely resembles *Bouie* and particularly *Rabe* than *Cole.* In any event, we conclude that Horelick was punished for conduct which was not criminal when committed and that the specific nature of the charge against him was not made known to him in time for him to defend against it. Accordingly, as to the trespass convictions, he is entitled to habeas corpus relief.[11]

The question remains whether Horelick's conviction for

resisting arrest can stand. We agree with the dissenting judges of the New York Court of Appeals that the evidence against Horelick on this count is weak. However, the mere fact that had we tried the case in the first instance we would have reached a different conclusion than did the state courts does not entitle Horelick to the relief he seeks. Title 28 U.S.C. § 2254(d) states:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct."

The presumption is conclusive unless one of eight conditions is met. The only condition which could arguably apply to this case is "8) . . . the Federal court on a consideration of . . . the record as a whole concludes that such factual determination is not fairly supported by the record." *Id.* We have carefully reviewed the record and are unable to say that the state court's determination of guilt on the charge of resisting arrest "is not fairly supported by the record." Unless one of the conditions mentioned above is met, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous." *Id.* We find that Horelick has failed to carry that burden.

Horelick's position does not depend on a factual challenge of the record. Rather, he claims that his resisting arrest conviction is constitutionally defective in two respects: 1) The Court of Appeals affirmance incorporated

the resisting arrest charge into the trespass charge by using it to support their theory of forcible entry and detainer, rather than considering it separately, thus denying him due process of law; and 2) since his arrest was unlawful, he had a right to resist it and could not be criminally punished for such resistance.

We find the first point unpersuasive. The majority opinion does describe the incidents surrounding the arrest at the same time as it discusses the factual basis of the forcible entry and detainer argument. However, in so doing, it states that "[a] police officer was called and Horelick resisted the arrest by physical efforts, trying to kick the policeman" (30 N.Y. 2d at 457), plainly indicating its agreement with the holding of the courts below on the specific issue whether Horelick was guilty of resisting arrest.

We also reject Horelick's argument that he had a right to resist the arrest because it was unlawful. It is true that Justice Jackson stated in *United States* v. *Di Re,* 332 U.S. 581, 594 (1948) that "[o]ne has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases." Nonetheless, for several reasons, we do not find this statement controlling. In the first place, the assertion is pure dictum, the issue in *Di Re* being whether probable cause to arrest can be inferred from *lack* of resistance. Secondly, no independent authority is cited to support it. Finally, the fact that *Di Re* was decided twenty-five years ago makes it poor precedent in an area which has been considerably rethought in recent years.

The right to resist unlawful arrests, although deeply rooted in the common law tradition, has been viewed with increasing disfavor. *Defiance of Unlawful Authority,* 83 Harv.L. Rev. 626, 636 (1970) [hereinafter *"Unlawful Authority"*]; Chevigny, *The Right to Resist an Unlawful Arrest,* 78 Yale L.J. 1128, 1129-33 (1969) [hereinafter "Chevigny"]. New York has expressly rejected it by

statute[12] (Penal Law § 35.27 (McKinney's Supp. 1972)) and its statutory rule overrides the common law approach unless there are constitutional objections.

Various constitutional bases for the right have been suggested (Chevigny at 1138-39),[13] but none has been accepted by the courts (*Unlawful Authority* at 638).[14] Horelick relies on two arguments: 1) That resisting arrest constitutes disobediance to an unlawful order which the Supreme Court has held, in some instances at least, cannot constitutionally be punished; and 2) that its punishment is a form of entrapment because it is the natural and predictable response to lawless governmental provocation.

Undeniably, the Court has held that a person cannot be punished for refusal to obey a police *order* which violates his constitutional rights. *See, e.g., Shuttlesworth* v. *Birmingham,* 382 U.S. 87 (1965); *Wright* v. *Georgia,* 373 U.S. 284 (1963). The question remains, however, whether resistance to an unlawful *arrest* more closely resembles refusal to obey an unlawful police order, which is not punishable, than disobediance of a constitutionally defective court order, which the Court has held *is* punishable by contempt. *Walker* v. *Birmingham,* 388 U.S. 307 (1967).

An unlawful arrest, like both a police order and a court order, can result in immediate interference with enjoyment of constitutional rights. It differs, however, from the former and resembles the latter in that an unlawfully arrested person like an unlawfully restrained one has open to him an opportunity to vindicate his rights in court. These rights are not irrevocably compromised by initial compliance as they are in the case of the person who obeys a police order and who, as a result, forever loses his chance to contest it by allowing the policeman the final say. Put otherwise, the arrest and the court order have built into them the potential of submitting the dispute to the impartial determination of the courts of law (including the appellate courts). The unlawful police order, on the other

hand, if obeyed, makes the policeman the final arbiter. This distinction persuades us that Horelick's situation is controlled not by *Shuttlesworth* and *Wright,* but by *Walker.*

Horelick's second argument, that to permit the state to punish resistance to an unlawful arrest is to countenance a form of entrapment, because the unjustified arrest constitutes governmental provacation to the arrested person whose defiance is its natural consequence, is an appealing one. Circumstances are readily imaginable in which an arrest would be so flagrant an intrusion on a citizen's rights that his resistence would be virtually inevitable. Such circumstances were not present in this case. Horelick had a colorable claim of right to be in the school, but the police had a colorable basis for his arrest. *Adickes* v. *Leary,* 436 F. 2d 540, 542 (2d Cir. 1971), *cert. denied sub. nom. Adickes* v. *Murphy,* 404 U.S. 862 (1971). Thus, however understandable Horelick's reaction may be in light of the emotionally charged situation in which the arrest occurred, it was not the legally justified result of deliberately lawless official provocation. Accordingly, we find no entrapment.

Thus, since Horelick had no constitutional right to resist arrest and the common law right has been preempted by the New York statutory rule, his resistance is properly punishable. This conclusion creates something of a dilemma in view of the fact that a single sentence was imposed on Horelick covering both the first trespass and the resisting arrest counts. Transcript at 574. It is impossible to allocate what part of that sentence represents the punishment for resisting arrest, especially since the combined sentence was identical to the sentence for the second trespass count which did not involve a resisting arrest charge. *Id.* at 575.

Accordingly, the convictions for trespass are set aside and the writ is granted in full unless the State resentences Horelick for resisting arrest within thirty days.

Opinion and Order, November 26, 1973.

It is so ordered.

Dated: New York, New York
November 26, 1973

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. When a public school is closed by its principal, the building is left in the charge of a custodial engineer. The letter was presented to the custodial engineer's assistant. For simplicity's sake, both the custodial engineer and his assistant are referred to in the opinion as the "custodian".

2. The custodial engineer's assistant refused to open the building because he was unable to verify by phone the authenticity of the letter.

3. Only the district superintendent or school principal was authorized by the directives to arrange "a 'legal' break-in." People's Exhibit 1.

4. Respondents conceded prior to the *Hensley* decision that a ruling in that case would be applicable to the case at hand.

5. Title 28 U.S.C. § 2244(b) reads as follows:

> "When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a judge or justice of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ . . . ."

6. The Court was referring to § 2244(a), but the same principles apply to § 2244(b).

7. Respondents' argument on this point takes the statement in *Adickes* v. *Leary*, 436 F.2d 540, 542 (2d Cir.), *cert. denied sub nom. Adickes* v. *Murphy*, 404 U.S. 862 (1971), that "[t]he

trespass arrests were therefore not illegal" as a definitive ruling on the merits of the case. This simplistic approach disregards the fact that the Court of Appeals was addressing itself to one issue only, whether Horelick and a co-plaintiff had stated a cause of action for damages against the persons involved in their arrest. It is unrealistic to construe this determination, reached in reviewing the granting of a motion to dismiss, as a final pronouncement on the merits of the case.

8. We agree, of course, with the minority opinion that the directives issued by the Board of Education on October 20th are no evidence as to the standards governing Horelick's behavior on the 17th and 19th and with their conclusion that "[i]f there is confusion in the sequential exercise of authority under the board's action here, it is a confusion which does not help the prosecution to establish beyond a reasonable doubt that this defendant teacher 'knowingly' entered or remained 'unlawfully in a building' (Penal Law, § 140.10)." 30 N.Y.2d at 459.

9. We assume that the majority is using the word "riot" in the colloquial sense and not as defined in Penal Law § 240.06, which requires a finding of physical injury to a non-participant or substantial property damage, neither of which occurred here.

10. In fact, *Bouie* implies that the injustice is greater in the latter case than in the former:

> "The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." 378 U.S. at 352.

11. Our conclusion that the Court of Appeals' interpretation of § 140.10 deprived Horelick of due process by subjecting him to *ex post facto* judicial legislation and by denying him fair notice obviates the necessity of deciding whether the statute

as applied is void for vagueness and overbroad and whether the state's conduct constituted entrapment.

12. New York is not alone in taking this position. *See, e.g.*, Cal. Penal Code § 834a (West 1970); Del. Code Ann. tit. 11, § 1905 (1953); Ill. Rev. Stat. ch. 38, § 7-7 (1971); N.H. Rev. Stat. Ann. § 504:5 (1955); R.I. Gen. Laws Ann. § 12-7-10 (1970); *State* v. *Koonce*, 89 N.J. Super. 169, 214 A. 2d 428 (App. Div. 1965).

13. Chevigny suggests three possible constitutional grounds for resisting arrest: 1) That it is necessary to vindicate other constitutional rights; 2) that it constitutes disobedience to an unlawful order; and 3) that it is a response to governmental provocation. Chevigny at 1138-39. Since the first is not applicable to this case, Horelick relies on the last two.

14. In *Wainright* v. *City of New Orleans*, 392 U.S. 598 (1968), two justices, dissenting from the dismissal of a writ as improvidently granted, suggested the possible existence of a right to resist arrest. *Id.* at 608 (Warren); *id.* at 613 (Douglas).

Defendant's Exhibit A, at Trial in New York City Criminal Court.

BOARD OF EDUCATION

CITY OF NEW YORK

OFFICE OF DISTRICT ONE

165 NORFOLK STREET

NEW YORK, N. Y. 10002

THERESA G. RAKOW
District Superintendent

TELEPHONES:
OREgon 4-3780-1-2

October 17, 1968

TO WHOM IT MAY CONCERN:

Mr. Edward Williams is authorized to be Teacher-in-Charge of W. I. H. S. provided no other supervisor from this school reports for duty.

THIS IS BY ORDER OF THE BOARD OF EDUCATION.

/s/ Jack Landman
SUPT. JACK LANDMAN

This is authorization for a locksmith to work in Washington Irving H. S.

/s/ Frances O'Brien
Chairman, D.O. I

Defendant's Exhibit B, at Trial in New York City Criminal Court.

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 LIVINGSTON STREET
BROOKLYN, N. Y. 11201

NATHAN BROWN
EXECUTIVE DEPUTY SUPERINTENDENT OF SCHOOLS

October 17, 1968

TO ALL DISTRICT SUPERINTENDENTS

The instructions of the Board of Education and the Superintendent of Schools are as follows:

1. Wherever a competent teacher of a school appears and is willing to assume responsibility for supervision of the school, such a teacher should be designated to open the school. Please do this in writing on official stationery, addressing the letter to the custodian. If you judge that there is no teacher competent to assume such responsibility and it is therefore necessary for the safety and welfare of any children to keep the school closed, please keep a log of your actions. Yours is the judgment as to competency of a teacher to assume this responsibility. However, you should be prepared to justify this position on the basis of qualifications of people who did appear for duty.

2. In the event that the school cannot be opened because the custodian refuses to open the school, or is not present, call the borough custodial headquarters—as a second step, call the office of Mr. Hudson and Mr. McLaren.

/s/ Nathan Brown
NATHAN BROWN
Executive Deputy
Superintendent

Defendant's Exhibit C, at Trial in New York City Criminal Court.

STATEMENT OF THE PRESIDENT OF THE BOARD OF EDUCATION MR. JOHN DOAR, OCTOBER 16th, 1968 7 P.M.

The Board of Education and Superintendent of Schools, other Officers and Staff of the school system, have been acting today to bring our critical school problems to solution.

To assure that our system, partially crippled by this illegal strike, remains open and available to those administrators, teachers and students who choose to work, the Superintendent has directed all District Superintendents to open—and keep open—every school where any teachers, in fact where only one teacher, reports to work. He has directed that if only one teacher reports—in the absence of other administrators—that teacher is to be in charge of the school. While the District Superintendent may of course order the school closed against real threat to the safety of persons in or around the school, the Superintendent has made clear that this responsibility must not be used as a ruse to keep any school closed.

The Superintendent of Schools has ordered four teachers of P.S. 271 to appear at the Board of Education Headquarters for an administrative hearing concerning allegations about their recent actions in that school. Investigation of allegations against other teachers is proceeding on an emergency basis.

The Board of Education in a meeting today declared its firm intent to accept the responsibility for the maintenance of a climate within all of the schools of its system conducive to cooperative and peaceful educational processes. The Chairman of the Board appointed today a special committee of the Board which is immediately charged with putting into operation a permanent system of observation of educational environment.

People's Exhibit 1, at Trial in New York City Criminal Court.

BOARD OF EDUCATION
OF THE CITY OF NEW YORK

October 20, 1968

To: Members of the Board of Education

FROM: Bernard E. Donovan, Superintendent of Schools

It is the intention of the Board of Education to open schools wherever this can be done without danger to the welfare and safety of children. Our purpose in opening schools is to conduct a meaningful instructional program. The public is urged to have patience with District Superintendents in the opening of schools since it may be impossible to open all schools at the same time.

The Superintendent of Schools delegates to the District Superintendent the responsibility of opening or closing of schools in his district during emergency periods. In doing this he should consult with his Local School Board.

The Superintendent of Schools recommends, however, that in the opening of schools there be given adequate consideration to the provision of custodial services. In order to protect the welfare and safety of pupils, it would be advisable to open a school only if there were present one or more persons familiar with the building. This could be a custodian-engineer, a custodian, a fireman, the principal or assistant-to-principal of the school or an experienced teacher who has served a reasonably long time in the school. Until heating becomes necessary, boilers should be shut down.

Some guidelines for opening schools where the school's custodian does not appear are as follows:

1. Try to obtain key from the school principal.

People's Exhibit 1, at Trial of New York City Criminal Court.

2. Contact area office for:

   a) possible assistance;

   b) key to school if available.

3. District Superintendent try to obtain key from custodian or from police precinct by asking a patrolman to come with the key. (This is subject to negotiation being carried on with Commissioner Leary and based on the assumption that the custodian did not change the locks.)

   Only the District Superintendent or the school's principal or the person designated as acting principal known as the Police Precinct may arrange for a "legal" break-in by:

   a) getting a locksmith;

   b) breaking lock or window in the presence of a policeman. They will permit this only in the presence of the District Superintendent or regularly assigned principal or designated acting principal.

The following hazards must be considered if we decide to open schools without regular custodians:

"Rule 15.4 (Division of Fire Prevention)—Each fire alarm system shall be in the charge of a person holding a Certificate of Fitness issued by the Commissioner. It shall be his responsibility to observe the provisions of Rule 14, Rule 15 and Rule 23.1."

"Rule 14.1—(Division of Fire Prevention—Every fire alarm system shall be tested each morning immediately after the hours of starting work. Nor shall such system be used for any other purpose except that the daily dis-

missal signals may be given if authorized by the Commissioner. The use of the system for fire drill purposes may be considered a test of those parts of the system actually used."

Also:

1. Handling of water and electricity.
2. Unattended doors and intruders.
3. Night security.
4. Lunch service—hot water needed, although we could serve cold lunches if delivery trucks will get through.
5. Emergency repairs –lights, stuffed toilets.
6. Broken glass.
7. Improper lighting.
8. Heat if it should turn cold—boiler management.
9. Lack of elevator service.
10. Damage to school when windows are left open.

Under the decentralization plan the Superintendent of Schools has indicated that district superintendents may initiate charges against personnel in the district. However, the Superintendent of Schools will not accept blanket charges against teachers because of the strike, even though the strike is illegal.

Parents and other citizens have no right to break into school buildings. Parental requests should be made to the District Superintendent's office.

Opinion of New York State Court of Appeals in People v. Horelick.

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

JAMES HORELICK,

Appellant.

BREITEL, J.:

Defendant Horelick stands convicted of criminal trespass in the second degree, a Class B misdemeanor (Penal Law, § 140.10, prior to amdt. L. 1969, ch. 341) and for resisting arrest (*id.*, § 205.30). He has been sentenced to a fine of $500 or to serve 60 days imprisonment if the fine is not paid.

Both crimes were committed in resisting the exclusion of Horelick and other school teachers from a closed, locked high school, and the ensuing arrest by police officers. The events occurred during an emotional and incipiently riotous confrontation between factions during a so-called citywide teachers' strike. The issue is not the lawfulness of the closing of the school, on which there may be divergent views, but the use of self-help to enter the school and then additional force to prevent arrest. Put another way, the issue is whether the resort to self-help by "breaking and entering" in the classic sense, is permitted, an issue laid to rest long ago by successive and ancient statutes relating to forcible entry and detainer (see Real Property Actions & Proc. Law, § 853; former Penal Law, § 2034, and source annotations; as to use of force against the person to gain

entry, see Model Penal Code [Tent. Draft No. 8, May 9, 1958], § 3.06, esp. subd. 2, 3, and 6, incl. Comments, esp. at pp. 42-45; Restatement, Torts, Second, § 88, Scope Note at pp. 158-159; Ann., Right to Use Force, 141 A.L.R. 250, esp. 276).

Stating the issue thus, and it is stated correctly, the convolutions of theory and conflicting pronouncements by the embattled school authorities whether the schools were to be open or closed are immaterial. So are, ultimately, analyses related to claims of right by owners and others entitled to rights of entry under property law. Even such property rights, by still being subject to restrictions on the use of force, emphasize the policy against self-help by force or other illegal methods.

There is no doubt that the President of the Board of Education, and perhaps the Board, had directed that the schools be kept open. It is equally undoubted that school principals are the immediate authorities in charge of their school buildings, with power (the exercise of which is reviewable by their superiors) to direct schools to be open or closed. Safety of students and teachers requires no less authority. There was also a prescription for opening schools improperly closed and that prescription was not followed by defendant Horelick or his associates.*

The principal in question, rightfully or wrongfully, had directed that the high school be kept closed. The school custodian, subject to the principal's command, and in charge of the school building while it was closed, kept it closed. It is irrelevant whether they did so out of factional

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* Paragraph 2 of the instructions read:

"In the event that the school cannot be opened because the custodian refuses to open the school, or is not present, call the borough custodian headquarters—as a second step, call the office of Mr. Hudson and Mr. McLaren."

motivation or because of fear that this high school, if opened, would be out of control. For their judgment and action, their conduct is reviewable elsewhere, and not by the subordinate school teachers, individually or as a body.

(Significantly, after the disorders and violence of October 17th, the Superintendent of Schools issued a directive on the procedure for opening schools, which included the following:

"1. Try to obtain key from the school principal.

2. Contact area office for:

a) possible assistance;

b) key to school if available.

3. District Superintendent try to obtain key from custodian or from police precinct by asking a patrolman to come with the key [This is subject to negotiation being carried on with Commissioner Leary and based on the assumption that the custodian did not change the locks.]

Only the District Superintendent or the school's principal or the person designated as acting principal known to the Police Precinct may arrange for a 'legal' break-in by:

a) getting a locksmith;

b) breaking lock or window in the presence of a policeman. They will permit this only in the presence of the District Superintendent or regularly assigned principal or designated acting principal.")

The fact is that on October 17, 1968 the school building was closed. A group of teachers, including defendant

Horelick, planned a take-over of the building, surreptitiously if possible. Horelick gained access to the building through a basement window and was discovered by a member of the custodial staff. A struggle ensued during which Horelick tried to open the locked doors of the school to admit his allies, who were not necessarily teachers or students. A police officer was called and Horelick resisted the arrest by physical efforts, trying to kick the policeman. It was when he was being placed in the police car that the codefendant Adickes played her part in repeatedly opening the police car door. While this was going on, a crowd of about 60 people, sympathetic to the open school effort, surrounded the police car.

To resolve the issue on whether the school was properly closed or not is, as has been already said, immaterial. The issue turns on whether the affected teachers had a "license" or "privilege" to open the school by surreptitious entry and force, and not whether they had a right or duty to be in the school (Penal Law § 140.00, subd. 5). Since only force or some other illegal method could be used to effect an entry which would inevitably provoke counter-force (in this case, even riot), the remedy to open the school was by seeking the assistance of superiors who had the power (and perhaps the duty) to open the school. Even they were not entitled to use force, but they, if they wished to persist in their purpose to open the school, had to resort to the assistance of the police, and beyond that the courts. Whether one views the problem from the position of the "striking" teachers or their antagonists it is not tolerable that the controversies be resolved in the streets or the school corridors, instead of under law, and in the courts, if necessary.

In this context, it is of less consequence, and it is even sadly regrettable, that a school teacher should suffer a penal sanction for conduct motivated by an ideology, even

if sincere. It would be of the gravest consequence, however, to suggest that self-help force may be condoned or justified by an inapplicable analysis whether the school "lawfully" should have been open or closed.

Accordingly, the order of the Appellate Term should be affirmed.

BERGAN, J. (dissenting):

The defendant's conviction for criminal trespass (Penal Law, § 140.10) and for resisting arrest (Penal Law, § 205.30) must be reversed on the ground his guilt was not established beyond a reasonable doubt.

The highest legal authority over school property in the school district of the City of New York is vested in the Board of Education (Education Law, art. 52, §§ 2550, 2554 [4]). The custody and control of "all" school property is there. (See, also, generally on school property, Education Law, § 414.)

John Doar, who on October 16, 1968 and immediately thereafter was the President of the Board of Education, testified that the Board had voted to keep the schools open during the then current teachers' strike and the Board also had agreed on the text of a "directive" which he was authorized by the Board to publish.

This directive, he testified, was addressed to the superintendent of schools, "to the employees of the school board", to the students, to their parents and to the citizens of the city. The assistant district attorney on the trial expressly conceded, in answer to the court's question, that the directive "was formulated by a majority of the Board at a duly constituted meeting".

Mr. Doar also testified unequivocally that the schools were never closed by the Board during the strike, either

informally or formally, and that "some of the employees of the Board were illegally, without authority closing the schools and locking them".

The directive as published was "to tell publicly employees of the Board and custodians and [that] we want to make it clear even if one teacher would want to go to school to teach that the school would be open."

The People argue that Gerard Oak, principal of Washington Irving High School, had general authority over that school under the by-laws of the Board of Education, and had ordered it closed on October 17 when defendant entered the school. They also note that Nathan Brown, executive deputy superintendent of schools, had issued under the authority of the Board of procedure for opening a school when "the custodian refuses to open the school".

But it is clear from Mr. Doar's testimony that the Board of Education's directive the schools be open "if there is only one teacher going to the school" was not affected by either of those circumstances as of the time material to this prosecution. The normal and routine authority of the local principal to close the Washington Irving High School under the by-laws was susperseded by the Board's contrary directive. Mr. Doar made it explicit that the procedure governing "authority of persons to open the schools" came "not until after" the directive to all teachers and employees to come to the schools had been issued.

If there is confusion in the sequential exercise of authority under the Board's action here, it is a confusion which does not help the prosecution to establish beyond a reasonable doubt that this defendant teacher "knowingly" entered or remained "unlawfully in a building" (Penal Law, § 140.10).

Mr. Horelick was assigned to this school and his right—indeed his duty under the Board's directive—was to be there in spite of an illegal strike. As already noted the

highest authority in the school system had published a directive advising that the schools would remain open and inviting teachers to come to work.

Actually, the Board regarded the closing of schools by custodians as "unlawful". That defendant came in through a window is not remarkable in the light of the hostility of custodians who were wrongfully closing the school. The prosecutor, therefore, has not established beyond a reasonable doubt that defendant was "wrongfully" in the school in which he was assigned to teach and both prosecutions on this charge are essentially similar.

Even if the legal right of defendant to be in the school were far more debatable than it is, a case would not be made out. The Appellate Division in *People* v. *Barton* (18 A D 2d 612) noted that a "colourable claim of right—even if it were mistaken—negatives the criminal intent necessary for a conviction under section 2036 of the Penal Law [predecessor to § 140.10]". (See, also, Judge Andrews' dictum on a legally mistaken entry on land in good faith in *People* v. *Stevens,* 109 N. Y. 159, 163.)

The decision in *People* v. *Williams* (25 N Y 2d 86), relied on by the People, is quite different, based as it was on proof of obstruction of public officers in discharge of duty under an entirely different kind of statute (former Penal Law, § 1851). The prosecution here for criminal trespass is sharply distinguishable, and it is enough to say that it is not established beyond a reasonable doubt.

Nor is the prosecution for resisting arrest (Penal Law, § 205.30) established beyond a reasonable doubt. When the testimony of the arresting officer, Patrolman John Van Houten, is analyzed, it is manifest that defendant put his hand up as though protesting the arrest without touching the officer. Although the officer intially testified that defendant "kicked at me", he altered this on cross-examination to say "attempted to kick me". When his actual

observation was sought he said merely that defendant "moved his leg" toward him.

The remaining proof bearing on an attempt to prevent arrest consisted of the officer's testimony that defendant was "Sort of twisting his body around, waving his other arm [the one not handcuffed]" and "More or less sort of wiggling his arms" and "kept putting his feet out in front of him" and "on the side of the radio car".

This does not actually establish the defendant's guilt for attempting to "prevent" the officer from "effecting" an authorized arrest under Penal Law section 205.30 (see *People* v. *Adickes*, decided today). Nor is this kind of minor objection to arrest a fair basis for a separate prosecution on a distinct crime.

The order should be reversed and the charges dismissed.

* * * * *

Order affirmed. Opinion by Breitel, J. All concur except Bergan, J., who dissents and votes to reverse and dismiss the information in an opinion in which Fuld, Ch. J., and Gibson, J., concur.

Opinion of New York State Court of Appeals in People v. Adickes.

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

SANDRA ADICKES,

Appellant.

BERGAN, Judge.

Following upon the arrest of a teacher, James Horelick, for trespass on school property, appellant Sandra Adickes, also a teacher, was arrested for interfering with the arrest (see People v. Horelick, 30 N.Y.2d 453, 334 N.Y.S.2d 623, 285 N.E.2d 864, decided herewith). The incidents grew out of a teachers' strike in New York City.

The information which is the basis of the prosecution of Miss Adickes was sworn to by Patrolman John Van Houten. It alleges that defendant "attempted to prevent him from effecting an authorized arrest of another person".

The statute on which the prosecution is grounded (Penal Law, § 205.30) provides, so far as here relevant, that a person is guilty of resisting arrest when he "intentionally" attempts to prevent a peace officer from "effecting" an "authorized arrest".

Miss Adickes, who was employed at Washington Irving High School on West 16th Street, belonged to a group of teachers opposed to the teachers' strike in October, 1968, which was concededly an illegal strike. She went to the school on October 17 following an announcement from the Board of Education of the City of New York that the

schools were open despite the strike and asking teachers to appear for duty.

She was in a group of teachers and pupils gathered outside the school building when Mr. Horelick, who also belonged to a group opposing the strike and who had been arrested in the school for illegal trespass, was being taken out of the building in custody and placed in a police car.

The arresting Patrolman Van Houten testified on direct examination by the prosecutor that after he placed Horelick in the police car "I noticed a door being open [sic] on the other side". He said he noticed Miss Adickes "had the door of the radio car open and she was pulling Horelick towards the door. * * * I just * * * shoved Miss Adickes in the car. I told her she was under arrest." On cross-examination the witness testified he saw defendant "touch" Horelick "with both hands".

Thus the bare record as developed contains both the equivocal statement that the defendant "touched" the already arrested Horelick and the conclusory expression that she "started to pull him" toward the door.

The weakness of this proof as a foundation to meet the People's burden of showing beyond a reasonable doubt that defendant intended to "prevent" the policeman from "effecting an authorized arrest" (Penal Law, § 205.30) is based on the fact that the trial court did not find defendant attempted to pull Horelick out of the car to "prevent" the arrest, or even that she "touched" Horelick. Its specific finding of her physical act is merely that she "did reach in the car".

The essential part of the factual finding is stated this way: "The Court finds the door was opened two times, or possibly three times. The Court further finds she did reach in the car and whether she did touch the defendant or not, her efforts were completely consistant [sic] with attempt-

ing to desist [sic] Horelick from the affection [sic] of the arrest, which could constitute a resisting arrest under 205.30 of the Penal Law. Her conduct cannot go unnoticed and I find it to be violative of the Laws of the State of New York. I deny her motion."

This factual finding, then, shows no act of interference except the opening of a door and reaching into a police car. These narrowly circumscribed acts are so equivocal and uncertain as to require this court to hold that defendant's guilt of intentionally attempting to prevent a peace officer from effecting an arrest is not established beyond reasonable doubt as a matter of law.

It should be added that if other proof in the case is considered in context, this defendant had a discussion with Patrolman Van Houten in which, protesting Horelick's arrest, she said that if he was arresting her fellow teacher he should arrest her, too, and he responded by arresting her.

Certainly such a protest should not be deemed a crime. On the view of the evidence most favorable to the People, and under the findings of the court addressed to the record, guilt was not established beyond a reasonable doubt and accordingly there should be a dismissal of this debatable prosecution.

The order of the Appellate Term should be reversed and the information dismissed.

BREITEL, Judge (dissenting).

It is unnecessary to repeat the views expressed in the companion majority opinion affecting the codefendant Horelick; they apply also to the defendant Adickes.

The remaining issue is whether Miss Adickes' conduct amounted to attempting to prevent the arrest of defendant Horelick. That arrest the court is simultaneously holding

proper as it does the conviction of Horelick for the crimes of trespass and resisting his own arrest.

One may take Miss Adickes' direct testimony to determine what she admitted doing: "And the policeman came and pushed me away from the door [of the patrol car] and I opened it again and again I said I want to go with him. I want to go with him. And I may have said one or two other things. I remember saying that. Then I was pushed away again and then the third time I opened the door I was—or I moved towards the door I was pushed in by a policeman and after a few minutes Mr. Horelick was in the car and there was also a boy in the car."

The incident occurred in the midst of a crowd of about 60 people, while defendant Horelick, his clothes already in disarray, was wriggling and kicking his feet toward a policeman as he struggled to prevent his detention. The police officer testified that when he placed Horelick into the patrol car through one door, defendant Adickes opened the other door and pulled Horelick toward the opened doorway. It was then, the officer said, that he walked around the car and arrested Miss Adickes by pushing her into the patrol car. His testimony was accepted by the trial court and the Appellate Term, and that finding of fact is supposed to be beyond review in this court.

True the trial court concluded it was unnecessary to determine whether Miss Adickes "touched" Horelick, but it found that she reached into the patrol car and that her efforts were consistent with an attempt to resist the detention of Horelick.

At the very least, Miss Adickes' trial testimony admits delaying the arrest and, therefore, interfering with it. The prosecution's evidence and the trial court's finding of intent established the essential element that she tried to prevent the detention.

Accordingly, the order of the Appellate Term should be affirmed.

FULD, C. J., and BURKE and GIBSON, JJ., concur with BERGAN, J.

BREITEL, J., dissents and votes to affirm in a separate opinion in which SCILEPPI and JASEN, JJ., concur.

Order reversed, etc.

Opinion of United States Court of Appeals in Adickes v. Leary.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SANDRA ADICKES and JAMES HORELICK,

Plaintiffs-Appellants,

v.

HOWARD R. LEARY, Police Commissioner of New York City, FRANK S. HOGAN, District Attorney of New York City, ANDRE CLERMONT, Custodian, Washington Irving High School, GERALD OAK, Principal, Washington Irving High School and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

Before:

FRIENDLY, SMITH and HAYS, *Circuit Judges.*

Appeal from dismissal of civil action seeking convening of three-judge court and injunction against criminal prosecution, in the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge.* Affirmed

ELEANOR JACKSON PIEL, New York, N. Y., *for Appellants.*

LEWIS R. FRIEDMAN, Assistant District Attorney (Frank S. Hogan, District Attorney for New York County, Herman Kaufman, Assistant District Attorney, of counsel), *for Appellee Frank S. Hogan.*

LEONARD KOERNER (J. Lee Rankin, Corporation Counsel, New York, N. Y., Stanley Buchsbaum and

Victor P. Muskin, of counsel), *for Appellees Leary, Clermont and Oak.*

Joel H. Sachs, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Appellee-Intervenor Attorney General.*

Smith, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge* granting defendants' motion to dismiss and denying plaintiffs' motion for the convening of a three-judge court and an injunction against the state criminal proceedings brought against plaintiffs. In October, 1968, the United Federation of Teachers declared an illegal strike against the New York City Board of Education. On October 16, the Board of Education directed that the schools be opened and available to students where a competent teacher appears at a school. District superintendents were thereupon authorized to issue letters of designation, appointing certain teachers as teacher-in-charge.

On October 17, plaintiffs, teachers at Washington Irving High School, appeared at that school along with Mr. Edward Williams, who had been designated teacher-in-charge. The police and defendants Clermont, school custodian, and Oak, school principal, refused them permission to enter. Approximately two hours later, plaintiff Horelick, allegedly under the "delegated authority" of Mr. Williams, entered the school. While in the school he was allegedly beaten by police, removed from the building, and arrested on charges of criminal trespass. He was also charged with

resisting arrest, and subsequently with harassment. On October 20, plaintiff Horelick again attempted to enter the building and was again arrested and charged with criminal trespass.

Plaintiff Adickes was arrested for interfering with the arrest of plaintiff Horelick. She complains that she was advised by her attorney that the District Attorney's office had information that upon being arrested, she had kicked a policeman in the groin. Having been told that, according to agents of District Attorney Hogan, if this information were not true the case would be dismissed, plaintiff Adickes submitted to a lie detector test which she "passed." The District Attorney, however, refused to dismiss the case against her.

The complaint in the present action names as defendants Messrs. Clermont, Oak and Hogan, and Howard R. Leary, Police Commissioner of the City of New York. Three causes of action are alleged. The first claims that defendants Clermont and Oak actively supported the initial arrests of plaintiffs and illegally pressed charges, thereby depriving plaintiffs of their first amendment right to teach. Damages were sought under 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The second cause of action alleged that defendants were engaged in a conspiracy to deprive plaintiffs of their privi-

leges and immunities as citizens, and specifically charged that defendant Clermont and defendants Oak and Leary "importuned agents of defendant Hogan" urging him not to drop the charges against plaintiffs. Further damages were sought under 42 U.S.C. § 1985, which gives rise to a cause of action for damages resulting from the aforementioned type of conspiracy. The third cause of action recounts the story of defendant Hogan's alleged promise to plaintiff Adickes and subsequent breach thereof, and seeks damages under § 1983.

Plaintiffs sought the convening of a three-judge court, pursuant to 28 U.S.C. § 2281, to declare that New York State Penal Law § 35.27, providing that "A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a peace officer," is unconstitutional on its face and as applied. They further requested that the three-judge court rule that New York State Penal Law § 140.10 (the criminal trespass statute) may not be applied to plaintiffs (a request that is apparently not being pressed on appeal), and that New York City Criminal Court Act § 40 unconstitutionally deprives them of a jury trial.

Since the dismissal of the complaint in this action the criminal charges, after removal to the District Court for the Southern District of New York, and remand to the state court, upheld in *The People of the State of New York* v. *Horelick and Adickes,* —— F.2d —— (2d Cir. 1970), have been tried and convictions had, from which appeals are pending, in which the effect on this prosecution of *Baldwin* v. *New York,* 399 U.S. 66 (1970), invalidating section 40 must be determined. All that remains before us on appeal is the claim for damages.

The claim of Miss Adickes against District Attorney Hogan is frivolous and was properly dismissed. Affording

an opportunity to take a polygraph test, or failing to carry out an alleged promise by a prosecutor to abide by its results can by no stretch of the imagination be elevated to a civil rights violation. Voluntary submission to such a test, even if it proved "demeaning and an indignity," hardly shows a lack of due process, nor does a breach of an alleged contract of doubtful legality, to drop a prosecution if such a test were "passed."

Nor is there any basis in the complaint for recovery on the other claims. Exhibit B annexed to the complaint makes it quite clear that Williams, the designated teacher-in-charge, was not authorized to try to force his way in, and indeed there was no authorization to delegate his authority to enter, even peaceably. The trespass arrests were therefore not illegal, and no question survives as to section 35.27, for the resistance was not to an illegal arrest.

The argument based on *Dombrowski* v. *Pfister,* 380 U.S. 579 (1965), must also fail, since the prosecution was not only not in bad faith, but justified and there is no basis pleaded for a claim of a continuing threat of harassing prosecutions in the future. Cf. *Powell* v. *Workmen's Compensation Board of State of New York,* 327 F.2d 131, 137 (2d Cir. 1964). The motion to dismiss the appeal as moot is denied. The judgment dismissing the action is affirmed.

Notice of Appeal.

SIR:

PLEASE TAKE NOTICE that the respondents hereby appeal to the United States Court of Appeals for the Second Circuit from an order of this Court, entered on December 4, 1973, directing that petitioner's convictions for trespass be set aside and that petitioner's writ be granted in full unless the State resentences petitioner for resisting arrest within thirty days, and from each and every part of said order.

Dated: New York, New York
January 2, 1974.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

By
/s/
.....

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To: PAUL CHEVIGNY, Esq.
New York Civil
Liberties Union
84th Fifth Avenue
New York, New York 10011

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Eleanor K. Hefferin , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellant herein. On the 18th day of April , 1974 , she served the annexed upon the following named person :

PAUL CHEVIGNY, ESQ.
Attorney for Petitioner-Appellee
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Eleanor K. Hefferin

Eleanor K. Hefferin

Sworn to before me this
18th day of April , 1974

Margery Evans Reifler

Deputy Assistant Attorney General
of the State of New York